Lim Pang Loong & Anor v University of East London

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22–1099 OF 2008
SITI KHADIJAH JC
21 FEBRUARY 2013

Contract — Breach — Agreement — Student recruitment contract — Whether agent had acted beyond scope of authority and mandate of principal — Whether claim for unlawful retention of fees and over-deduction of contractual commission by agent established

Contract — Oral agreement — Variation of terms of written agreement — Oral agreement inconsistent with terms of written agreement — Whether written contract superseded by oral agreement — Whether oral agreement and representation admissible as binding contract

Evidence — Adverse inference — Evidence Act 1950 s 114(g) — Failure to call material witness — Court accepting as true content of e mail sent by defendant's representative — Defendant failing to call maker of email to prove otherwise — Adverse inference made against defendant

Evidence — Admissibility of evidence — Oral agreement — Whether oral agreement and representation admissible to vary or add to terms of written contract

The first plaintiff ('Lim') was the director and shareholder of the second plaintiff (regional office). Lim also set up and owned Edsys Sdn Bhd. There was a formal contract signed between UEL and Edsys for services in student recruitment in 1998 and expiring in 2008 ('the 1998 agency contract'). In return for Edsys's services UEL had agreed to pay Edsys 10% of the fee received as commission in respect of students enrolling in courses offered by UEL. In this suit, Lim was seeking a declaration that he was entitled to run the regional office and collect commission and other sums from the defendant ('UEL') until 2015 and that the termination letter dated 25 June 2008 from the defendant was void. UEL is a publicly funded charitable educational institution based in the United Kingdom. According to Lim, with the setting up of the regional office, the 1998 agency contract was superseded by a new oral agreement between the parties for services up to 2015, which UEL denied. Lim testified that one Graham Parry, then head of UEL's International Office, had told him to open the regional office and on its opening Lim was given permission to run

the office and get 10% commission from the students introduced for a period until 2015. To prove his claim Lim produced Graham Parry's email dated 8 October 2012 (exh P73). The defendant counterclaimed against the plaintiffs and Edsys on the grounds that they had unlawfully retained fees that were due to UEL from HELP, over deducted contractual commission, pledged on an unauthorised basis of UEL's credit to third parties, and caused loss of income from potential students. The issues which arose for determination were, inter alia, (a) whether there was an agreement between the defendant and the plaintiffs that the plaintiffs would be allowed to operate and administer the regional office until the end of 2015; and (b) whether the oral agreement (if any) had been duly and validly terminated by the defendant.

Held, dismissing the plaintiffs' claim and the defendant's counterclaim with no order as to cost:

(1) The court believed the content of exh P73 as true and in support of Lim's contention. Hence, it was for the defendant to prove otherwise by producing Graham Parry as their witness. Hence, the court invoked the presumption under s 114(g) of the Evidence Act 1950 that if Graham Parry was produced by the defendant to give evidence his evidence would be unfavourable to the defendant (see paras 13–14).

(2) After the signing of the 1998 Agency Contract, only agreements and representation properly made and duly recorded in writing were acceptable as binding. As such, the plaintiffs cannot be allowed to claim that the 1998 agency contract was of no effect as the provisions in the agreements were clear and precise. Arising from the provisions of the said 1998 agency contract itself, Lim was in no position to insist that the parties were bound by an oral agreement that superseded the 1998 agency contract (see para 32).

(3) The setting up of the regional office was all the way none other than to support and facilitate the 1998 agency contract, as proposed by Lim himself. Thus, the relevancy of the regional office had to end at the expiry of the said 1998 agency contract (see para 33).

(4) Representations and promises were made but there was no binding agreement between the defendant and the plaintiffs that the plaintiffs would be allowed to operate and administer the regional office in Kuala Lumpur until the end of 2015. Thus, there was no necessity for the defendant to terminate any oral agreement with the plaintiffs. The plaintiffs were not entitled to the reliefs sought in the statement of claim (see para 36(a), (b), (c)).

(5) The defendant failed to prove sufficient evidence that Edsys Sdn Bhd had wrongfully and unlawfully retained the fees or failed to remit the fees due to the defendant, over-deducted the contractual commission due to them

or acted beyond the scope of authority and mandate of the defendant in purportedly pledging credit or agreeing to reimburse third parties expense on behalf of the defendant (see para 36(e)(i)–(iii)).

[Bahasa Malaysia summary

Plaintif pertama ('Lim') merupakan pengarah dan pemegang saham plaintif kedua ('pejabat serantau'). Lim juga menubuhkan dan memiliki Edsys Sdn Bhd. Terdapat kontrak formal yang ditandatangani antara UEL dan Edsys untuk perkhidmatan dalam pengambilan pelajar pada tahun 1998 dan berakhir pada tahun 2008 ('kontrak agensi 1998'). Sebagai balasan untuk perkhidmatan Edsys, UEL telah bersetuju untuk membayar Edsys 10% daripada yuran yang diterima sebagai komisyen apabila pelajar-pelajar mendaftar dalam kursus-kursus yang ditawarkan oleh UEL. Dalam guaman ini, Lim menuntut satu deklarasi bahawa dia berhak untuk menguruskan pejabat serantau dan mengumpul komisyen dan jumlah lainnya daripada defendan ('UEL') sehingga tahun 2015 dan bahawa surat penamatan bertarikh 25 Jun 2008 daripada defendan adalah terbatal. UEL merupakan institusi pelajaran berkebajikan yang dibiayai awam di United Kingdom. Menurut Lim, dengan penubuhan pejabat serantau, kontrak agensi 1998 digantikan dengan perjanjian baru secara lisan antara pihak-pihak untuk perkhidmatan sehingga tahun 2015, di mana UEL menafikannya. Lim memberi keterangan bahawa Graham Parry, yang pada ketika itu merupakan ketua pejabat antarabangsa UEL, telah memberitahunya untuk membuka pejabat serantau dan pada pembukaannya Lim diberikan kebenaran untuk menguruskan pejabat dan mendapat 10% komisyen daripada pelajar-pelajar yang diperkenalkan untuk tempoh sehingga tahun 2015. Untuk membuktikan dakwaannya Lim mengemukakan emel Graham Parry bertarikh 8 Oktober 2012 (eksh P73). Defendan menuntut balas terhadap plaintif-plaintif dan Edsys atas alasan-alasan bahawa mereka telah mengambil yuran yang terhutang kepada UEL daripada HELP secara tidak sah, terlebih menolak komisyen kontrak, menyandarkan kredit UEL secara tidak sah kepada pihak ketiga, dan menyebabkan kehilangan pendapatan daripada pelajar-pelajar yang berpotensi. Isu-isu yang timbul untuk ditentukan ialah, antara lainnya: (a) sama ada terdapat satu perjanjian antara defendan dan plaintif-plaintif bahawa plaintif-plaintif dibenarkan untuk mengendalikan dan menguruskan pejabat serantau sehingga penghujung tahun 2015; dan (b) sama ada perjanjian secara lisan (sekiranya ada) telah secara sah dan sewajarnya ditamatkan oleh defendan.

Diputuskan, menolak tuntutan plaintif dan tuntutan balas defendan dengan tiada perintah mengenai kos:

(1) Mahkamah percaya bahawa eksh P73 adalah benar dan menyokong dakwaan Lim. Oleh itu, terletak kepada defendan untuk membuktikan sebaliknya dengan mengemukakan Graham Parry sebagai saksi mereka. Oleh itu, mahkamah menggunakan anggapan di bawah s 114(g) Akta

Keterangan 1950 bahawa sekiranya Graham Parry dibawa oleh defendan untuk memberikan keterangan, keterangannya tidak akan berpihak kepada defendan (lihat perenggan 13–14).

(2) Selepas menandatangani kontrak agensi 1998, hanya perjanjian-perjanjian dan representasi-representasi yang dibuat sewajarnya dan direkod secara bertulis diterima sebagai mengikat. Oleh itu, plaintif-plaintif tidak dibenarkan untuk mendakwa bahawa kontrak agensi 1998 tidak berkuat kuasa memandangkan peruntukan-peruntukan di dalam perjanjian tersebut adalah jelas dan bertepatan. Yang timbul daripada peruntukan-peruntukan kontrak agensi 1998 itu sendiri ialah Lim tidak layak untuk menegaskan bahawa pihak-pihak terikat dengan perjanjian lisan yang menggantikan kontrak agensi 1998 (lihat perenggan 32).

(3) Penubuhan pejabat serantau adalah tidak lain dan tidak bukan untuk menyokong dan membantu kontrak agensi 1998, seperti yang dicadangkan oleh Lim sendiri. Oleh itu, kerelevanan pejabat serantau berakhir pada tamatnya tempoh kontrak agensi 1998 tersebut (lihat perenggan 33).

(4) Representasi-representasi dan janji-janji telah dibuat tetapi tiada perjanjian yang mengikat antara defendan dan plaintif-plaintif bahawa plaintif-plaintif dibenarkan untuk mengendalikan dan menguruskan pejabat serantau di Kuala Lumpur sehingga akhir tahun 2015. Oleh itu, tiada keperluan untuk defendan menamatkan sebarang perjanjian lisan dengan plaintif-plaintif. Plaintif-plaintif tidak berhak untuk relief-relief yang dituntut dalam penyataan tuntutan (lihat perenggan 36(a), (b), (c)).

(5) Defendan gagal untuk membuktikan keterangan mencukupi bahawa Edsys Sdn Bhd telah mengambil yuran-yuran secara salah dan tidak sah atau gagal untuk meremit yuran-yuran terhutang kepada defendan, terlebih menolak komisyen kontrak yang terhutang kepada mereka atau bertindak di luar skop kuasa dan mandat defendan dengan sengaja menyandarkan kredit atau bersetuju untuk membayar balik perbelanjaan pihak ketiga bagi pihak defendan (lihat perenggan 36(e)(i)–(iii)).]

Notes

For a case on variation of terms of written agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 5411.

For cases on agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2926–2936.

For cases on Evidence Act 1950 s 114(g), see 7 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 171–173.

For cases on oral evidence, see 7 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 128–129.

Cases referred to

Armagas Ltd v Mundogas SA The Ocean Frost [1985] 1 Lloyd's Rep 1, QBD (refd)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)

Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)

Koh Siak Poo v Perkayuan Oks Sdn Bhd & Ors [1989] 3 MLJ 164, SC (refd)

Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145, FC (refd)

UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4 (refd)

Legislation referred to

Evidence Act 1950 ss 91, 103, 114(g)

N Devan (Devan & Associates) for the plaintiffs.
Lim Koon Huan (Shaleni Sangaran with her) (Skrine) for the defendant.

Siti Khadijah JC:

FACTS

[1] The first plaintiff Lim Pang Loong ('Lim') is the director and shareholder of the second plaintiff ie University of East London Regional (SEA) Sdn Bhd (regional office) which is owned by Lim and his wife. Lim also sets up and owns Edsys Sdn Bhd ie the third defendant of the defendant's counterclaim and had signed the 1998 agency contract on behalf of Edsys. In fact all dealings with the defendant ie University of East London ('UEL') since the 1980's had been with Lim.

[2] On that basis Lim is seeking a declaration that he is entitled to run the regional office and collect commission and other sums from UEL until 2015; and that the termination letter dated 25 June 2008 from the defendant was void. Here the plaintiffs are claiming general damages from the defendant.

[3] UEL is a publicly funded charitable educational institution based in the United Kingdom. There is no dispute that there was a formal contract signed between UEL and Edsys for services in student recruitment in 1998 and expiring in 2008. In return for Edsys's services UEL had agreed to pay Edsys 10% of the fee received as commission in respect of students enrolling in courses offered by UEL. However according to Lim with the setting up of the regional office the 1998 agency agreement was superseded by a new oral agreement between the parties for services up to 2015, which UEL denies.

[4] The defendant's counterclaim against the plaintiffs and Edsys are on the

grounds that they had unlawfully retained fees that were due to UEL from HELP, over deducted contractual commission, pledged on an unauthorised basis of UEL's credit to third parties, and caused loss of income from potential students. According to UEL all these have caused loss and damage to UEL. The defendant is claiming for specific damages and general damages. In the full hearing that was conducted in this case the plaintiffs and the defendant each produced two witnesses.

ISSUES

(a) Whether there was an agreement between the defendant and the plaintiffs that the plaintiffs would be allowed to operate and administer the regional office in Kuala Lumpur until the end of 2015?;

(b) whether the oral agreement (if there is any) had been duly and validly terminated by the defendant through defendant's letter dated 25 June 2008?;

(c) whether the plaintiffs are entitled for the reliefs sought in the statement of claim?;

(d) whether the defendant is entitled for the counterclaim pleaded in the counterclaim?; and

(e) whether Edsys Sdn Bhd and/or the plaintiffs had wrongfully and unlawfully:

(a) retained the fees or failed to remit the fees due to the defendant?;

(b) over-deducted the contractual commission due to them?; and

(c) acted beyond the scope of authority and mandate of the defendant in purportedly pledging credit or agreeing to reimburse third parties expense on behalf of the defendant?.

ASSESSMENT OF FACTS AND APPLICATION OF LAW

[5] The burden of proof is primarily on the plaintiff to establish its claim first at which instant it becomes incumbent upon the defendant to prove its defence. The burden of proof does not depart from the plaintiff throughout the entire proceedings being the party who desires the court to give judgment as to its legal rights upon facts it asserts. Likewise the burden of proof of a defendant in a counterclaim is what is borne by a plaintiff in a suit. The court's duty is to consider on a balance of probabilities the facts produced by both parties based on evidence that the court could reasonably believe, and thereafter to decide and accept the most probable of the two versions available before it.

[6] In *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ

145, the Federal Court had held (at p 145) that, 'the burden of proving a fact rests on the party who substantially asserts the affirmation of the issue and not upon the party who denies it: for a negative is usually incapable of proof'.

Under the Evidence Act, 1950 the relevant sections are:

According to s 101:

(a) whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist;

(b) when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 102 provides that the burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all were given on either side.

Under s 103 the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[7] In the case of *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4 Sinnthuray J of the Singapore High Court held that:

> In civil cases, as much as in criminal cases, a party must prove his case before the burden of proof shifts to the other side … In a civil case, it is on a balance of probabilities. But the proof is that the balance must be tilted by the plaintiff before the defendant makes his case.

In this claim it is the plaintiffs pleaded case that there exists an oral agreement between the plaintiff and UEL for services up to 2015. The plaintiffs are relying on Lim's evidence to prove the existence of the oral contract.

[8] At the outset counsel for the defence submits that the plaintiffs have failed to prove the three basic essentials to the creation of a contract namely — agreement, contractual intention and consideration, quoting *Chitty on Contracts*, Vol 1 General Principles, (30th Ed), at 2–160 and 2-161 that states the basic contractual principles as follows:

(a) Contracts are not lightly to be implied and the court must be able to conclude with confidence that the parties intended to create contractual relations.

(b) The burden of proof on the issue of contractual intention in the case of an implied contract rests on the proponent of the contract.

(c) In the absence of an expression of intention, the legal effect of an agreement is not determined by the subjective intentions of the parties or one of them.

(d) Intention is to be judged objectively.

[9] Lim's evidence is that since the 1980s his dealings involved the recruitment of students to foreign universities and represented the defendant before the signing of the 1998 agency agreement. The dealings with the defendant since 1980 were all oral without any written contract until 1998 when the normal mode of dealings between them was by way of instructions given orally or by email.

[10] According to Lim he promoted the defendant and had done his best to attract students to study with the defendant and take their courses. He was also responsible in securing HELP Institute and other local institutions to be partners with the defendant and during the launch of the regional office there were already a total of ten Malaysian institutions in collaboration with the defendant.

[11] Lim goes on to inform the court that it was Graham Parry then (Head of UEL's International Office) who was given the authority to contract with third parties and being the person responsible in the signing of the 1998 agency agreement was pleased with his work had told him to open the regional office and on its opening Lim was given permission to run the office and get 10% commission from the students introduced for a period until 2015. According to Lim, who was never paid salary, he was promised that as long as HELP Institute was with UEL he would continue on and would get his agreed commission for all moneys received by the defendant.

[12] To prove his claim Lim has produced the email of Graham Parry dated 8 October 2012 and marked as exh P73 at p 1 bundle C3 the content of which reads as follows:

> Dear Mr Raman,
>
> This is a brief answer from my hand phone
>
> In 1998 there were discussions with the VC (Frank Gould) and Mr. Lim regarding his commission contract. The VC was totally clear — Mr Lim's role was to make sure the 3 + 0 project was launched, and if so Lim would be paid 10% of revenue for as long as the project ran — that would be up to 2015 and beyond. That agreement also applied to other Malaysian Projects such as Legenda and Wim. If those projects are still running we have agreed to his commission.
>
> I do not believe that either the later 10 year agency contract or the even later regional office operation would have changed or overwritten this basic understanding.
>
> I do not remember a specific conversation in 2004 about this (I left UEL that year so did not have a 2005 conversation).
>
> But there may have been calls about the validity of the contract to 2015 — and had he asked about this I would have confirmed that if the projects were running in 2015 his commission would be paid.

It is also true that the next VC (Mike Thorne) would always honour these kind of commitments made by predecessors and in my opinion would be paid.

It is also true that the next VC (Mike Thorne) would always honour these kinds of commitments made by predecessors and in my opinion that was right and proper.

Yours faithfully Graham Parry

Sent from my BlackberryA (R) smartphone

[13] Reading the content of the exhibited email P73 (which has also been referred to by the defendant) from the former employee of the defendant whose good reputation and credibility stands unchallenged and untarnished in all aspects, I believe the content as true and in support of Lim's contention. In the circumstances I am of the opinion that it is for the defendant, if they so wish to prove the content otherwise, to produce Graham Parry who is living in the United Kingdom as their witness to be cross-examined in court.

[14] Pursuant to s 114(g) of the Evidence Act of 1950 the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events and human conduct that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. In the circumstances I'm invoking the presumption under the said s 114(g) of the Evidence Act that if Graham Parry is produced by the defendant to give evidence his evidence would be unfavourable to the defendant.

[15] Lim claims that the 1998 agency agreement was superseded by the new oral agreement between the parties and that this was a promise made to him by Graham Parry and Michael Thorne who was then the vice chancellor of UEL. He cites the welcome message of VC Professor Michael Thorne (p 30 of bundle C1) who stated that Lim has long had close links with UEL and 'the office was set up to enable monitoring as there was very stiff competition in the now crowded market'.

[16] The plaintiffs submit that after the opening of the regional office parties never complied with the terms of the 1998 agency contract. According to Lim he was told by Graham Parry himself to disregard the agency agreement and his counsel submits that the setting up of the regional office itself clearly showed that the parties had moved beyond the scope of the 1998 agency agreement. It is the plaintiffs' evidence that a new agreement arose after the opening of the regional office where Lim was promised it would continue until 2015.

[17] It is the plaintiffs' contention that as Ms Adrienne Clarke ('DW1') only joined the defendant in October 2006 she would not have personal knowledge of the dealings between the plaintiffs and the defendant prior to this which was

handled by Graham Parry and Professor Michael Thorne. As for DW2 ie Mr Keith Wilson Willett (being in accounts department) during cross-examination had admitted that he has no personal knowledge of the 1998 agency contract prepared by Graham Parry or the setting up of the regional office, he was not a party to any of the discussions and negotiations which were done and there were no minutes of any meetings on the setting up of the regional office in Malaysia to which the defendant could refer to.

[18] On the other hand according to the defendant the arrangement for Lim to set up a regional office did not affect the terms of the 1998 agency contract, including, for example the payment of commission by UEL; as can be seen in the letter by Lim to Professor Gould of April 2001 which stated expressly that:

> It is not proposed that the current role and functions of Lim Pang Loong will in any way be affected, particularly in respect of the business development services and his receipt of commission in accordance with the prevailing arrangements. The current arrangements should therefore remain largely unchanged.

[19] According to the defendant the regional office was set up upon the proposal and recommendation of Lim in order to support Edsys' obligations under the 1998 agency contract with the following job scope, inter alia:

(a) to provide quick response to matters raised by Malaysian collaborators/partners;

(b) to monitor progress and activities of each of the collaborators and preparing progress reports;

(c) to follow up on payments for UEL; and

(d) to make all arrangements for UEL's staff visiting Malaysia especially meetings with the collaborators.

[20] The defendant submits that under this arrangement, Lim was liable for the cost of maintaining the office such as rental, staff salaries and other expenses, although UEL made a contribution from time to time to the initial set up costs of establishing the regional office and staff costs.

[21] From the evidence it is clear that UEL had at all material times duly complied with the terms of the 1998 agency contract, namely, in the receipt of invoices for payment from Edsys in respect of commission and duly making payment as invoiced by Edsys. As submitted by the defendant's counsel a perusal of the voluminous amount of invoices and remittance records filed in court show that the payments of commissions made by UEL are consistent with and in accord with the provisions and terms of the 1998 agency contract it had executed with Edsys. According to the records Edsys itself was issuing

invoices and receiving payment from UEL throughout the tenure of the 1998 agency contract and Lim himself has accepted that the commission pleaded for in the statement of claim is the commission to which Edsys is entitled to under the 1998 agency contract.

[22] The defendant asserts that the 2015 date is clearly an afterthought as at the material time of the alleged representation, there was no collaborative agreement or arrangement in place which ran till 2015; the HELP collaborative agreement at that time, running only until 2008 was in tandem with the 1998 agency contract. As for DW1 and DW2 the defendant contends that they are competent witnesses for UEL, quite apart from their direct involvement on behalf of UEL before, after or during the tenure of the 1998 agency contract and the regional office set-up they have had complete access to all information and financial records.

[23] Though the defendant's witnesses concede that the setting up of the regional office was not covered by the 1998 agency contract their version is that the said office could not function without it. In effect according to the defendant when the 1998 agency contract expired there was no longer a need for the regional office to be running as it was only in existence to support and facilitate the 1998 agency contract. According to the defendant the arrangement for the regional office should in fact be read in light of the 1998 agency contract and the position and relevancy of the regional office ended when the 1998 agency contract expired.

[24] The defendant's contention is that if what Lim is claiming is true he would have written to UEL indicating that he has a contract until 2015 but there is none. Instead his evidence shows that he had written to UEL stating that his agreement with UEL would expire in 2008. When Adrienne Clarks (DW1) wrote to Lim indicating the expiry date of the 1998 agency contract there were no response in reply from either of the plaintiffs to say of an alternative arrangement between them or to assert the existence of an oral contract between them that would last until 2015. There is not a single reference or written record of such agreement which was to run for a period of almost 18 years scheduled to expire in 2015. The defendant believes that it is impossible for Edsys or the plaintiffs to be operating under the 1998 agency contract, and at the same time told to ignore the same.

[25] In respond to that the plaintiffs direct the attention of the court to the many emails they had sent in 2007–2008 to the defendant. In a letter dated 21 July 2008 from his solicitors at pp 9–13 of bundle B it was clearly put forward that Lim was entitled to run the regional office until 2015. In the email dated 5 January 2007 to Sharifah Ahmed of UEL at pp 38–40 of bundle D1 Lim had stated his appointment was similar to HELP Institute, so from that

time he had always maintained as long as HELP Institute was in relation with the defendant he would also be in an agreement with the defendant and the agreement with HELP Institute until 2015. In an email to Raymond of the Legenda group dated 18 April 2008 at pp 15–16 of bundle D5, which was referred to by the defendant, Lim invites the court to look at para 2 of the email as follows:

> … My agreement is tied down with the HELP Agreement for 10 years from 1998 to 2008. The HELP'S agreement has already been renewed and legally I do not foresee any problems with renewing mine. We have this understanding because I had assisted HELP in getting the 3 + 0 license for them. Therefore with this in place, my agreement would also be extended as well. Paul Chan has just sent me SMS telling me not to worry about it and he will take care of it.

[26] In *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 the Supreme Court agreed with the observation made in *Armagas Ltd v Mundogas SA The Ocean Frost* [1985] 1 Lloyd's Rep 1 as follows:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.
>
> In commercial cases there is usually a substantial body of contemporary documentary evidence. This is not strictly speaking a commercial case, but the relevancy of contemporaneous documents nevertheless holds true.

[27] On reflection of the evidence available before the court as well as from observations of the conduct of the parties I am of the considered view that Lim had been aware that the 1998 agency contract subsisted and governed the conduct of both UEL and Edsys. However there were on a number of occasions when Lim had discussions about his commission contract with Graham Parry and VC (Frank Gould) who at that point of time were very pleased with Lim's role to make sure the 3 + 0 project was launched had agreed that Lim would be paid 10% of UEL's revenue for as long as the project ran-that would be up to 2015 and beyond. As it is obvious from Graham Parry's email P73 the agreement also applied to other Malaysian Projects such as Legenda and Wim for as long as the projects were running they had agreed to his commission.

[28] It is clear to the court that Lim's insistence is based on all these undocumented representations and promises which according to him must be honoured (knowing that such promises were not applicable and contrary to the provisions of the 1998 agency contract which was still subsisting then). This explains why Lim had confirmed in his emails to Sharifah Ahmed of UEL dated 5 January 2007 and to Raymond Ooi of Legenda dated 18 April 2008

that his contractual arrangements with UEL expired in 2008. This also explains why Lim had at no time raised to UEL particularly to Adrienne Clarke that he had a contract with UEL lasting until 2015.

[29] Falling back on the 1998 agency contract the relevant clauses are as follows:

(a) Clause 13.4
Whole agreement —
Each party acknowledges that this Agreement contains the whole agreement between the parties and that it has not relied upon any oral or written representation made to it by the other or its employees or agents and has made its own independent investigations into all matters relevant to it.

(b) Clause 13.5
Supersedes prior agreement —
This Agreement supersedes any prior agreement between the parties whether written or oral and any such agreements are cancelled as at the Commencement Date.

(c) Clause 13.6
Discretion —
Any decision exercise of discretion judgment or opinion or approval of any matter mentioned in this Agreement or arising from it shall be binding on a party only if in writing and be at its sole discretion.

[30] This court observes that in *Koh Siak Poo v Perkayuan Oks Sdn Bhd & Ors* [1989] 3 MLJ 164 the Supreme Court had held that, 'Where the written contracts are clear and unambiguous the court should not go behind the written terms of the contract to introduce or add new terms to it'.

[31] There is also s 91 of the Evidence Act 1950 that provides:

> When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

[32] The effects of the clauses were that after the signing of the 1998 agency contract only agreements and representation properly made and duly recorded in writing were acceptable as binding. In the circumstances the plaintiffs cannot be allowed to claim that the 1998 agency contract was of no effect as the

provisions in the agreements were clear and precise. Arising from the provisions of the said 1998 agency contract itself, Lim is in no position to insist that the parties were bound by an oral agreement that superseded the 1998 agency contract.

REGIONAL OFFICE (THE SECOND PLAINTIFF)

[33] According to the evidence and facts in hand it is clear to this court that the setting up of the regional office was all the way none other than to support and facilitate the 1998 agency contract, as was proposed by Lim himself. In regard to this matter this court is in agreement with the contention of the defendant and hereby makes a finding that the relevancy of the regional office had to end at the expiry of the said 1998 agency contract.

JURISDICTION

[34] In the context of this case I am of the opinion that the submission of both parties to the jurisdiction of the Malaysian court is clear indication of their acceptance of this court's jurisdiction as appropriate.

THE DEFENDANT'S COUNTERCLAIM

[35] According to the 1998 agency contract all moneys were to be paid to the defendant. By the letter by Graham Parry (D65) on 2 September 1999 payment was to be paid to the defendant to an account in Barclays Bank account no 40739529 for 60% of the fees and 40% will be paid to a company known as East London Enterprise to an account in Singapore (bundle D2 pp 20–22). I find that the defendant has failed to produce sufficient evidence to prove its case. There is no proof to show that the plaintiffs and Edsys had collected monies from students or any third parties. As to the counterclaim for the unpaid retained fees due to the defendant from HELP this is an issue to be resolved between the defendant and HELP.

[36] On grounds as stated above and on a balance of probabilities the court's findings are that:

(a) representations and promises were made but there was no binding agreement between the defendant and the plaintiffs that the plaintiffs would be allowed to operate and administer the regional office in Kuala Lumpur until the end of 2015;

(b) there was no necessity for the defendant to terminate any oral agreement with the plaintiffs;

(c) the plaintiffs are not entitled to the reliefs sought in the statement of claim;

(d) the defendant has failed to prove that it is entitled to the counterclaim as pleaded in the counterclaim; and

(e) I find that the defendant has failed to prove sufficient evidence that Edsys Sdn Bhd had wrongfully and unlawfully:

(i) retained the fees or failed to remit the fees due to the defendant;

(ii) over-deducted the contractual commission due to them; and

(iii) acted beyond the scope of authority and mandate of the defendant in purportedly pledging credit or agreeing to reimburse third parties expense on behalf of the defendant.

[37] If the plaintiffs had proven to the court that their rights had been infringed and judgment were in their favour, in the circumstances of this case I would grant the plaintiffs nominal damages of RM1m on the grounds that they have failed to prove its amount.

[38] In *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 at p 100 Ong Hock Thye FJ when delivering the judgment of the Federal Court said:

> The respondent, as plaintiff of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed), para 174. For its practical application, I would quote Lord Goodard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89;
>
> … plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, 'This is what I have lost; I ask you to give me these damages'. They have to prove it.

DECISION

[39] On a balance of probabilities I find that the plaintiffs have failed to

prove their claim and the defendant has failed to prove its counterclaim. For those reasons I'm dismissing the plaintiffs' claim as well as the defendant's counterclaim. There is no order as to cost.

Plaintiffs' claim and the defendant's counterclaim dismissed with no order as to costs.

Reported by Kanesh Sundrum